MICHAEL RODAK, JR

No. 80-344

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUINAULT PACIFIC CORPORATION,
INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC., and
GOLD REY FOREST PRODUCTS, INC., Petitioners,

versus

AETNA BUSINESS CREDIT, INC.
and JOHN C. PENNINGTON, TRUSTEE, Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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SUPPLEMENTAL QUESTIONS CONCERNING THE SUPERVISORY POWER

1. *Whether* false quotation of evidence, false statement of law, false assertion that issue not raised below, in respondents' briefs *justify* exercise of this Court's power of supervision in light of serious charges against respondents made in petitions for writ of certiorari.

2. Should a doubt be raised that the court-ordered deposition of a Freeman & Hawkins' partner (or the latter's incriminating time slips therein identified) is a part of the record on appeal in the 60(b) or fee case, *whether* a proper exercise of this Court's power of supervision *would be to analyze* the court-ordered deposition (and the attached time slips), which petitioners have had certified to this Court.

3. Should a doubt be raised that respondents' briefs make statements at variance with admissions in taped oral argument before a third panel of the court of appeals, *whether* a proper exercise of this Court's power of supervision would be to grant petitioners' June 30, 1980 application to *certify, transcribe and transmit* the oral argument tape to this Court, on which this Court apparently reserved decision.

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III. SIGNIFICANCE OF WHAT IS NOT SAID IN RESPONDENTS' BRIEFS

Respondents' briefs in opposition to writs of certiorari do not deny that respondents researched, drafted, edited and typed (a) the 12-page, June 17, 1976, bankruptcy order-opinion approving the $350 settlement; or (b) the 37-page, September 11, 1978, fee memorandum enumerating petitioners' alleged missteps; or (c) the 5-page, November 14, 1978, fee memorandum specifying the hours expended; nor (d) that the bankruptcy judge lied to petitioners in open court on March 6, 1978; nor (e) explicity deny admissions *in judico* at oral argument, April 14, 1980, before a third panel of the court of appeals.

There being no difference in appearance between a secret delegation of opinion-writing and collusion, every such act of the bankruptcy judge carries an appearance of partiality requiring mandatory disqualification under 28 U.S.C.A. §455. There being no defense to the judge's misrepresentations, he had a disabling bias as a matter of law. There being a clear conflict between Aetna's briefs and its admissions in open court, the tapes should be brought up and explanation demanded.

IV. FALSE STATEMENTS OF LAW

Statement (A)[1] — This is a false statement because it presumes the existence of facts which Aetna knows did not occur. For example, the bankruptcy judge did not announce decision on the 60(b) motion at the end of the September, 1977 hearing. He took the case under advisement.[2] Local Rule 91.8 requires court announcement of decision. Moreover, IN NO INSTANCE did respondents tender "sufficient copies for all parties" of the "orders including findings of fact and conclusions of law" "prepared in writing by the attorney for the prevailing party" as required by Local Rule 91.8. Respondents admitted this failure.[3]

Statement (B)[4] — This statement of law is false.

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[1] "Such a procedure [as respondents followed in jointly preparing the 40-page, 60(b) opinion with the bankruptcy judge] . . . is expressly provided for by Rule 91.8 of the Local Rules. . . ." (Aetna's Brief at 8-9.)

[2] The bankruptcy judge's last words on September 20, 1977 are as follows:

"The Court is going to set aside November 9 and 10 as possible dates for the continued trial in this matter if the evidence is needed.

"Court will be adjourned."

[Transcript, September 20, 1977, at 311: Supp. R. (79-1076) Vol. V. at 311.]

[3] In fact, as to the order entered September 16, 1977, the trustee's co-counsel, D. L. Cronkright, testified March 3, 1978 (at p. 85):

A. [By D. L. Cronkright] Did I send you a copy of what?

Q. [By Petitioners' counsel] Of that which you submitted to him [the bankruptcy judge] at his request, that was a proposed order in a case?

A. [By D. L. Cronkright] I did not.

Similarly, as to the order entered September 23, 1977, Cronkright testified March 3, 1978 (at 88-89):

Q. [By Petitioners' Counsel] Did you send me a copy of the one that you submitted to him [the bankruptcy judge]?

A. [By D. L. Cronkright] I did not.

[4] "Such award [of attorney's fees . . . against the parties' counsel, individually] may be predicated upon either or both of two grounds. Bankruptcy Rule 911 * * * [and] * * * §1927 of Title 28, U.S.C. * * * " (Trustee and Freeman & Hawkins' Brief 80-345, at 6).

The Supreme Court held June 23, 1980 that 28 U.S.C. §1927 did not confer power on a federal court to award attorneys' fees as costs against counsel. *Roadway Express, Inc. v. Piper*, — U.S. — , 100 S.Ct. 2455 (1980). Trustee and co-counsel actually cite *Roadway* at another place in their brief (page 8). *Roadway* had been cited in petitioners' June 30, 1980 application for stay etc. and September 2, 1980 fee petition (Case No. 80-345). Therefore, Trustee and co-counsel can only be guilty of an attempted deceit on this Court.

Statement (C)[5] — Neither Shepard's U.S. Citations, U.S. Reports, Lawyers Edition nor Supreme Court Reporter covering October Terms 1941 to 1947 indicate Supreme Court review of *In re Swartz*, 130 F.2d 229 (7th Cir. 1942).

V. FALSE QUOTATION OF EVIDENCE

Statement (D) — Aetna represents in footnote No. 1 on page 9 of its brief that the bankruptcy judge said: "I don't think we even discussed it."[6] The judge made no such statement. Aetna's quotation is malicious because the first three words of the manufactured quote, "I don't think [we even discussed it]", would be idiomatic when one's recollection was challenged and would mean, I did not discuss it. If there was a trace of doubt, it would be scarcely of import.

The words to be construed were: "- - we even discussed it," preceded by a broken sentence and an abandoned thought.

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[5] "In *Swartz, supra* the United States Court upheld the award of attorney's fees by a Bankruptcy Court." (Trustee's Brief, 80-345, at 6.)

[6] To petitioners' recollection, this is the first time respondents have denied that the judge made the admission. Until their Fifth Circuit brief, respondents' position seemed to be that the March 6, 1978 transcript was not a part of the 60(b) record, since the case was on appeal to the district judge when the hearing was held. The Fifth Circuit ruled April 7, 1979 that the March 6, 1978 transcript was a part of the 60(b) record. In ensuing appellate briefs, Aetna took the position that *its counsel* did not discuss the matter with the judge, *not that the judge did not admit it*, raising the issue of what is a discussion. However, at oral argument on April 14, 1980, Aetna's lawyer, R. William Ide III admitted in open court that Aetna's other lawyer, C. Edward Dobbs had discussed the order opinion with the judge. Petitioners urged the Court of Appeals to grant an *en banc* rehearing on account of Ide's admission. Petitioners urged *this* Court to call for the oral argument tape. Application No. A-1169, filed June 30, 1980, resubmitted July 15, 1980. From April 14, 1980 to October 8, 1980, respondents did not dispute petitioners' recollection of Ide's oral argument. Now that Aetna has uttered a false quotation and undercut the thrust of a statement to a panel of three Fifth Circuit judges, *the oral argument tape should be called for.*

The court of appeals held that *ex parte* conferences occurred.[7] The court had that portion of the record containing this admission before it when it made the finding.[8] Such a finding is appropriate where a judge's impartiality is questioned for the first time on appeal under the doctrine of *Davis v. Board of School Commissioners*, 517 F.2d 1044 at 1051 (5th Cir. 1975), *cert. denied* 425 U.S. 944 (1976). Moreover, the finding is correct.[9]

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[7] "... the occurrence of *ex parte* conferences between the bankruptcy judge, the trustee, and Aetna's lawyer alone do not demonstrate collusion." 581 F.2d 520 at 521.

[8] From the June 26, 1978 district judge's 60(b) affirmance of the January 5, 1978, 40-page opinion and December 20, 1977 order written by Aetna's lawyer for the bankruptcy judge, petitioners simultaneously filed a FRAP 4 notice of appeal to the court of appeals (Case No. 78-2926), as to which a record on appeal was designated and transmitted, and a FRAP 6 petition for allowance of appeal (Case No. 78-8283). (Such a practice is suggested in 9 *J. Moore's Federal Practice*, Par. 206.02 pp. 1205-06.) *The March 6, 1978 transcript of the continued fee hearing was designated item No. 95 filed September 27, 1978 as "Appellants' Designation of Record with Respect to Notice of Appeal to court of appeals for Fifth Circuit filed July 26, 1978."* The district judge entered a September 29, 1978 order authorizing the clerk to forward copies of the record on appeal to the court of appeals, and the record was mailed to the court of appeals the same day. See docket sheet entries on pp. 26 and 27, located as index at front of R. (79-1076) Vol. I, which petitioners asked to be certified to this Court.

[9] Petitioners' counsel was conducting cross-examination of C. Edward Dobbs, Aetna's lawyer on March 6, 1978, having received Freeman & Hawkins' incriminating time records by clerical gaffe on February 28, 1978 and having deposed Pennington, Cronkright, Ide and Dobbs on March 3, 1978. Petitioners' counsel asked Dobbs whether conferences with Pennington and Cronkright on September 15, 1977 had anything to do with his "*ex parte* conference with Judge Norton to draft an order in th[e 60(b)] case." A partner of Dobbs at Kutak, Rock & Huie, serving as Dobbs' counsel, made an objection; the judge stated that an "accusation" had been made against him; and he overruled the objection *for the moment only* with this comment:

> "... That's the same sort of charge counsel made some days ago concerning someone else writing an opinion of this Judge, which I denied, or which is not factual, and if counsel wants to go into it he can. ... *I don't know what he meant by the ex parte conference or what*, but we will let counsel explore that, if he wishes." [Emphasis added.]

After Dobbs' counsel insisted that such questions were irrelevant because Aetna sought no fees pertaining thereto, the judge observed:

> "... *I just don't know what counsel means*, and I'll ask him right now: *what do you mean* by that statement *about some kind of ex parte conference* in which something was done. It sounds more ominous than the question might appear." [Emphasis added.]

Petitioners' counsel then read Canon 3A(4) of the Code of Judicial Conduct for United States Judges which restricts *ex parte* communications. The judge responded: "I don't know of any such. ..." but he allowed cross

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VI. FALSE STATEMENTS OF EVIDENCE

Paraphrase E[10] The Trustee swore: "I have had breakfast with

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examination of Dobbs to continue for a moment longer. When petitioners' counsel asked Dobbs whether he was aware of the judge's *ex parte* telephone calls and conferences to the trustee and Cronkright to draft the September 16, 1977 Order, the judge sustained objections. After further colloquy, the Court again confronted petitioners' counsel about petitioners' allegations concerning *ex parte* conferences pertaining to the 40-page, Rule 60(b) opinion of January 5, 1978. Petitioners again explained. The judge still seemed to be confused as to whether petitioners' objection was to a mere discussion, an *ex parte* discussion, or Dobbs drafting the 40-page opinion. So it was that in thinking out loud about the draft opinion which Dobbs had drafted for him earlier and whether he had asked Dobbs for more research and writing to cover a specific point, he adverted to the conversation and blurted out a declaration of past fact: We even discussed it. The statement was not uttered in connection with a preceding broken-off sentence when the apparently trivial discussion darted across his mind. The judge was saying that the discussion was not an *ex parte* conference and its occurrence did not mean that Dobbs had drafted the judge's order. Later he reversed himself and said "I do not recall any such [*ex parte* conference]." When he was asked whether Dobbs had made any input into the 40-page opinion, the judge cut off further colloquy and cross-examination.

Proof that the judge made a declaration of a past fact is demonstrated by a linguistic examination of the two uses to which the adverb "even" is put in the following sentences:

> "Now, you keep using the words wrote and draft. Now, that is incorrect. Mr. Dobbs' office typed an opinion for this Court. I don't *even* remember whether, at the time, I gave him back the briefs, that Mr. - - we *even* discussed it. [emphasis added.]"

The first "even" is spoken after a concern is expressed about the parameters of the words "wrote and draft." The judge is being more precise than petitioners' counsel; the judge is stating that his memory is not exact. By contrast, the syntax in which the second "even" appears would prohibit a meaning of "exactly." Thus, the second "even" is used as an intensive to emphasize something unexpected and unimportant and to stress the comparative degree of his later recollection to his earlier memory. See *Webster's New Collegiate Dictionary* (1973) at 396.

The court reporter in the bankruptcy judge's courtroom is hired by the bankruptcy judge (Bankruptcy Act of 1898, Sec. 38(7); Bankruptcy Rule of Procedure 511) who has the power not only to fire the court reporter or to quit using him, but also to assess costs against a party to pay the court reporter a competitive rate for services, as for a private deposition.

After the above colloquy was concluded, petitioners asked the court reporter to transcribe the hearing as quickly as possible. The transcript was available March 11, 1978. The transcript was faithful to the words used on page 25, but erred in not capitalizing "we" in line 22. Petitioners agonized over whether to raise this point of capitalization but feared that with attention drawn to their contentions, the bankruptcy judge would deny the declaration or might invalidate the entire transcript.

[10] The bankruptcy judge and the trustee did not have breakfast together, September 20, 1977, immediately prior to the remanded rule 60(b) hearing. (Aetna's brief at 9.)

him before and it could have been that day. . . ." Depo. John C. Pennington, March 3, 1978 at 27. In oral argument on April 14, 1980 the trustee's attorney, Douglas L. Cronkright, stated that the trustee and judge had breakfasted together September 20, 1977. The "Reply of John C. Pennington, Trustee, to Petition for Allowance of Appeal" filed in the Fifth Circuit August 7, 1980 (hereinafter, "The Reply") allows an inference on page 17 which is opposite in meaning to Aetna's hearsay statement about the sequence of events at the breakfast table, to wit: Rather than the coffee-drinking judge inviting the belated trustee to the table, it was the trustee who was having breakfast and invited the judge to sit and have coffee with him.[11] Petitioners have asked the Fifth Circuit clerk to forward "The Reply" to this Court.

Statement (F)[12] — The recited sequence in which the December 20, 1977 order and January 5, 1978, 40-page opinion were prepared is false as revealed by Freeman & Hawkins' time slips No. "267" and "268" found in "Appellants' Exhibit No. A-2," to the deposition of Cronkright, taken March 3, 1978, and identified by him as time slips delivered to petitioners' counsel February 28, 1978 by Cronkright's paralegal (Pp. 93, 22, 61, 62, 38). The time slips are set out at Petitioners' Joint Appendix at p. 251; they read as follows:

"12/20/77 Delivery of Norton's Order and pick-up of draft of opinion .3"

"12/20/77 Telephone conference with Dobbs regarding Judge Norton's Order opinion written. . . . .2"

The 60(b) Order is dated and was filed December 20, 1977. It would be impossible to research and draft a 40-page judicial opinion, have it typed, submit it to a judge, confer with the judge thereon, and then retype it, all on December 20. Therefore, the opinion referenced on the December 20 time slips was prepared prior to that date, and prior to the order of the same date. This is amply confirmed in the time slips for November 1, 2, 1977. *See* App. at 249.

Statement (G)[13] — This statement of Aetna is false, abso-

[11] "For the same reasons, the drinking of coffee by the Judge at the Trustee's restaurant breakfast table does not form the basis for a disqualification, especially where the Trustee has sworn that the merits of the case were not discussed."

[12] "After he entered his order denying Petitioners' Rule 60(b) motion, the Bankruptcy Judge directed counsel for Respondents to prepare and submit to him proposed findings of fact and conclusions of law." (Aetna's assertion of the sequence of events, Brief at 8.)

[13] "There is nothing in the record to support [petitioners' assertion of *ex parte* conferences concerning the Rule 60(b) motion] . . . ." (Aetna's Brief at 8.)

lutely. Cronkright signed his name on August 4, 1978 for Freeman & Hawkins, as attorneys for the trustee, to "The Reply" which states at p. 16, as follows:

> "As shown by the sworn testimony of the Trustee and his counsel, the meetings in connection with the first Order were the only *ex parte* conferences between the Court, Trustee and his counsel."

From Cronkright's March 3, 1978 deposition, at pages 82, 83 appears the following:

> Q. [By Petitioners' Counsel] Had you had any other *ex parte* conferences with the referee, Norton, prior to this one?
>
> A. [By Cronkright] If you're speaking of Judge Norton, I've had no *ex parte* conference with him other than in connection with the taking of this order.

Pennington then gave the opinion that if he had discussed the 60(b) hearing with the bankruptcy judge before the hearing at breakfast, which he denied, it would have been "unethical." Depo. Pennington, March 3, 1978, at 28 and 27. The trustee's "Exhibit 'A' " to affidavit attached to "Application of the Trustee and Co-Attorney for the Trustee for Compensation," filed February 27, 1978 shows *ex parte* conferences with the bankruptcy judge on September 15, 1977, September 16, 1977, November 1, 1977, November 2, 1977 and December 20, 1977. See App. at 245, 246, 249, 251.

Even the district judge owned up to an *ex parte* conference with the trustee in the order entered September 30, 1976 in the plenary action. *See* App. at 153.

Although Ide told the third Fifth Circuit panel that Aetna would not hide behind the alleged non-presence in the 60(b) or fee records of disqualifying evidence of misconduct, Aetna has taken the opposite tack in its brief. But as previously shown the position is not well taken. The evidence is in the record.[14]

[14] As to the 60(b) case, the matter was on appeal to the district court when *trustee's second fee application* was filed February 27, 1978 depicting in exhibited time records to his affidavit that he had had conferences with the bankruptcy judge concerning the 60(b) motion from September to December 1977. Not only are these time records in the fee record (Vol. I), they are also in the 60(b) record (Vol. I of the fee record is also marked Vol. I of the 60(b) record) because petitioners so designated them in September 1978 in another appeal which was stricken, but the instant appeal was ultimately granted and the district court resubmitted the first record on

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Statement (H)[15] — This statement in Aetna's reply to the fee petition apparently is a reference to allegations in the first full paragraph on page 7 of Aetna's reply to the 60(b) petition. The first sentence of that paragraph[16] contains two false statements

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appeal as the second record on appeal. Aetna failed to object as to the record for the first appeal and its objection to the record for the second appeal was ineffective because the district judge's February 20, 1979 order is unclear as to its application to the 60(b) or fee case. Moreover, this Court can take judicial notice in the 60(b) case of their inclusion in the fee case.

Freeman & Hawkins' incriminating time slips, delivered to petitioners' counsel by clerical gaffe on February 28, 1978 are located on three pages designated appellants' exhibits A-1, A-2, A-3 to the deposition of D. L. Cronkright, March 3, 1978, in which they are identified thrice by the deponent. They also appear as an attachment to affidavit of petitioners' counsel dated March 6, 1978 and filed in connection with (a) an application to district court on March 6, 1978 to take depositions of respondents' counsel pending appeal of the 60(b) case to the district court and (b) a second application filed in bankruptcy court on March 6, 1978, to remove the trustee and his co-counsel, Freeman & Hawkins. Furthermore, the incriminating time slips are attached to an amended reply and supplemental brief filed in district court on March 17, 1978 which related to a reply and supplemental brief filed March 15, 1978 raising in the 60(b) case the improprieties depicted in the time slips and records.

Aetna's fee memorandum for the bankruptcy judge filed September 11, 1978 refers to petitioners' second application filed in bankruptcy on March 6, 1978 to remove the trustee and effectively denies the application. Petitioners' counsel's affidavit attaching incriminating time slips of Freeman & Hawkins, submitted in connection with the motion, were thus considered to be part of the fee record by the judge, and Aetna should not be heard to complain now.

Cronkright's March 3, 1978 deposition forms part of the 60(b) record on appeal because it was designated a part of the record in a first appeal from the district court to the Fifth Circuit, to which Aetna took no exception, and was resubmitted by the district court as the record on appeal to a second appeal which was heard by the Court of Appeals. Aetna's objection was untimely. His deposition is a part of the fee record because Cronkright did not disaffirm it upon reference thereto by petitioners' counsel at the continued fee hearing March 6, 1978. In similar fashion the depositions of Pennington, Ide and Dobbs are part of the records on appeal in the 60(b) and fee cases.

Should this Court have any doubt whether Freeman & Hawkins' incriminating time slips or Cronkright's, *Pennington's, Ide's or Dobb's depositions* are part of the record, three additional issues are raised:

1. Whether the Fifth Circuit oral argument tapes should be certified, transcribed and submitted to this Court.

2. If the tapes disclosed Ide's concession that Aetna would not avoid the issues of impropriety by any technical deficiency in the record, whether this Court' supervisory power should be invoked to work an estoppel against Aetna to back away from its concession.

3. Without reference to the tape, whether this Court's supervisory power could or should be invoked to consider evidence outside the record which is probative because an admission or declaration against interest by

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of evidence. In fact, Petitioners' counsel stated: "I believe that I knew that there had been a fire, but I had no idea[precisely] when the fire had taken place. . . ." (Supp. R. (79-1076) Vol. V at 227.) The bankrupt's verified Statement of Affairs, filed August 7, 1974, represented that the fire occurred January 19, 1974 (which was *after* the Aetna-Forest Park loan documents were signed on or about January 7, 1974) and not December 31, 1973 (which was *before* the date of those documents). The correct dates demonstrate, along with other evidence cited in the cert. petition, Aetna's fraud upon and harm to the bankrupt. Contrary to Aetna's assertion that "the bankrupt's officers [testified about] the fire in detail . . . ." the deposition shows the following:

> "Q [By John E. Sawhill then-attorney for International Paper Company] Tell me about the fire that Georgia Paneling Company of Forest Park had. I understand there was a loss in January of 1974 of - -
> A [By T. R. Locke] Um-humm
> Q - - $76,000 in inventory and equipment and the claim was settled in full.
> A Yes.
> (Deposition T. R. Locke, September 20, 1974 at 40.)[17]

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lawyers or obtained by proper legal process with right to counsel.

For argument that the tapes should be brought up, see petitioners' "Applications" filed June 30, 1980 and renewed July 15, 1980. (No. A.1169) The Supreme Court has not ruled on this particular application. The scope of the supervisory power is unlimited once invoked. That federal judges and attorneys admitted to the Bar of this Court are involved should remove any inhibition against its exercise.

[15] "Petitioners[ ] . . . willfully misrepresented as newly-discovered certain evidence that they had had for almost two years. . . ." (Aetna's brief, No. 80-345, at 4).

[16] "Petitioners represented that they were unaware prior to the settlement hearing before the Bankruptcy Court either that the [1] fire had occurred or that [2] Aetna had received any of the insurance proceeds." (Aetna's brief, No. 80-344, at 7.)

[17] The second false statement is Aetna's assertion that Petitioners *represented* they lacked knowledge that Aetna had received any of the insurance proceeds and that petitioners claimed this was newly-discovered evidence. In fact, petitioners' counsel swore that "[o]n August 13, 1974, I examined the bankruptcy file . . . . I also learned that the fire loss was covered by insurance and the payment was retained by Aetna to apply to the indebtedness owed by Sup; ly to Aetna." This affidavit was submitted to the bankruptcy judge on October 11, 1977, after he had adjourned the remanded 60(b) hearing for submission of briefs of evidence, but before he had announced decision on the motion; and the affidavit corrected petitio-

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VII. MISLEADING STATEMENTS OF FACT

Paraphrase (I)[18] — Respondents' briefs condemn petitioners' attempt to prohibit Aetna from actively participating in the remanded 60(b) hearing, but do not state why. The statement of the case should provide part of the answer. Too, Aetna had presumed itself to be a mere "amicus curiae" in respect of petitioners' appeal from the June 17, 1976, Aetna-prepared bankruptcy order approving the $350 settlement. "Brief of Amicus Curiae Aetna Business Credit, Inc.", filed November 15, 1976, has been certified to this court at petitioners' request. Contradictorily, Aetna then filed an application on September 1, 1977 for an award of attorneys' fees for that appeal. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946), expressly prohibits attorneys' fees or costs to amicus curiae. Petitioners wanted to keep Aetna an amicus and place on Aetna the burden of showing the trustee was incompetent to resist petitioners' 60(b) motion.

Paraphrase (J)[19] — There is a fatal contradiction in Aetna's brief of respondent (and Aetna's opinions for the bankruptcy judge). On the one hand, Aetna acknowledges that "the factual assertions of Petitioners" are "assumed as true" (Brief at 8), and on the other hand, "there is nothing in the record to support the majority of Petitioners' contentions. Their sole 'proof' relating to the fire consisted of the affidavit of Ms. Roberts which nowhere [gives certain information]." (Brief at 7 and 8.) However, Aetna's former vice president, Thomas C. Duke, testified that "something like $500" was remitted by Aetna to the bank;[20] Aetna's internal audits for October 31, 1973 demonstrate that $21,524 of (year to date) sales were generated through Forest Park[21]; on October 31, 1973 Forest

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ners' recollection at the 60(b) hearing (". . . I did not know, as I recall, that Aetna had insured it or that there were insurance proceeds."). At no time did petitioners claim that their learning that Aetna had received insurance proceeds was newly-discovered evidence, but only that Aetna's failure to remit that portion representing Roberts' equipment (not Paneling's equipment) *harmed the bankrupt*. See 60(b) motion at pages 3-4, 23, 25, 31, 22. The taking of the above-referenced Locke deposition was disclosed at the May 18, 1976 settlement hearing. (Supp. R. (79-1076) Vol. II at 54.)

[18] Seeking to bar Aetna's active participation was unreasonable (although Aetna was a self-described *"Amicus curiae."*) (Aetna's brief at 3.)

[19] There is insufficient newly discovered evidence (notwithstanding contradiction in Aetna's argument). (Aetna's brief at 7-8.)

[20] Deposition, T. C. Duke, June 15, 1977, Vol. II at 159. (not in record on appeal)

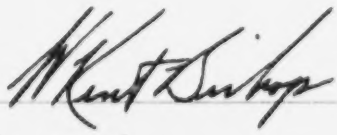
[21] Pl. Exhibit 366.(not in record on appeal)

Park had $22,497 of inventory at cost[22]. Contrary to Aetna's assertion T. R. Locke's affidavit constitutes proof that $26,000 was the amount of insurance proceeds attributable to the equipment[23] which Roberts itemized in an affidavit. As to whether the Bankrupt was rendered insolvent as a result of loss of Forest Park's operations, Roberts' affidavit lends itself to that reasonable inference.[24] Also petitioners' statement of evidence which was assumed to be probative was that loss of the Forest Park outlet rendered the Bankrupt insolvent.[25] Roberts was outside the court room and prepared to fill in the details when the hearing was adjourned.

Paraphrase (K)[26] — Consider that the trustee telephoned the bankruptcy judge's secretary September 14, 1977, conferred twice *ex parte* with the judge September 15, consuming 5.5 hours; conferred with judge 7.8 hours on September 16 and then telephoned the judge later that day that the order had to be changed; consumed 4.9 hours in drafting an order for the judge on September 19, and then had breakfast before an 8:00 a.m. hearing on the 60(b) motion, September 20.

Thus there was opportunity, over the preceding four business days, for them to make a breakfast appointment; there was reason to do so, i.e., to further discuss draft orders for the judge and to plan the hearing and its successful outcome (for the trustee and Aetna).

Respectfully submitted,
WINFORD KENT BISHOP



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[22] Pl. Exhibit 370. (not in record on appeal)

[23] Affidavit, T. R. Locke, July 19, 1977, paragraph 4. (R79-1076.)

[24] Paragraphs 24, 25, 26 and 27.

[25] "Capital is what generates income. The Georgia Paneling Company of Forest Park, Inc., was capital to be looked at as capital. It produced cash flow that was essential to Georgia Paneling Supply because in December it became insolvent, and Aetna started jockeying around with the advances and restrictions. All right. That capital, that $60,000 was very important to Georgia Paneling and should have been used in the business to buy new inventory or to buy a new store or a new outlet or a new lease or something like that." (Supp. R. (79-1076) Vol. V at 238.)

"So that's what Georgia Paneling did. Aetna had put them in a situation of extremis. . . ." (*Id* at 240.)

[26] At breakfast encounter, September 20, 1977, bankruptcy judge was "unaware" of 8:00 A.M. hearing; and enounter was by "chance" and "coincidental."

VIII. CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Reply Brief of Petitioners upon each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to counsel at their last known addresses.

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This 27 day of October, 1980.

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